STATE OF MICHIGAN

COURT OF APPEALS

LAKESHORE GROUP, CHARLES ZOLPER, JANE UNDERWOOD, LUCIE HOYT, WILLIAM REININGA, KENNETH ALTMAN, DAWN SCHUMANN, GEORGE SCHUMANN, MARJORIE SCHUMANN, and LAKESHORE CAMPING, Plaintiffs-Appellants,	UNPUBLISHED December 18, 2018
v	No. 341310 Court of Claims
STATE OF MICHIGAN, Defendant,	LC No. 17-000140-MZ
and DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant-Appellee.	

Before: RIORDAN, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ.

RONAYNE KRAUSE, J. *(dissenting)*.

I respectfully dissent. The majority accurately sets forth the background facts and relevant law. However, I disagree with the majority's reading of critical binding case law.

As we and the parties agree, the outcome of this appeal turns on how to read *Preserve the Dunes v Dep't of Environmental Quality* (*Preserve the Dunes II*), 471 Mich 508; 684 NW2d 847 (2004).[1] Specifically, this matter turns on our Supreme Court's statement that "[a]n improper

[1] Considerable emphasis was placed at oral argument on *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 488 Mich 69; 793 NW2d 596 (2010). Because that case was subsequently vacated, I decline to consider it. *Anglers of the AuSable, Inc v Dep't of*

administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA." *Preserve the Dunes II*, 471 Mich at 519. When that statement is considered in context, I conclude that our Supreme Court did not hold that an improper administrative decision cannot constitute wrongful conduct under MEPA. Rather, it held that an improper administrative decision does not *necessarily* constitute wrongful conduct under MEPA.

In *Preserve the Dunes*, an entity called TechniSand possessed a pre-existing sand mining permit set to expire in 1993; TechniSand applied for, and the DEQ granted, an amended permit in late 1996. *Preserve the Dunes II*, 471 Mich at 511-512. The amended permit allowed TechniSand to expand its mining operation from "a noncritical dune area into an adjacent critical dune area." *Preserve the Dunes v Dep't of Environmental Quality* (*Preserve the Dunes I*), 253 Mich App 263, 266; 655 NW2d 263 (2002). The plaintiff, Preserve the Dunes (PTD), sued TechniSand and the DEQ nineteen months later, alleging, in relevant part, "that the DEQ violated MEPA when it approved TechniSand's amended mining permit." *Preserve the Dunes II*, 471 Mich at 512. Notably, the trial court had held a seven-day bench trial and specifically determined that TechniSands's mining operation would not adversely affect the environment sufficiently to constitute a violation of MEPA. *Id*., 471 Mich at 513, 518-519, 522, 524.

Furthermore, the analysis on appeal concerned TechniSands's *eligibility* for a permit. Eligibility is determined pursuant to MCL 324.63702(1) and MCL 324.63704(2), both of which "are unrelated to whether the applicant's proposed activities on the property violate MEPA." *Preserve the Dunes II*, 471 Mich at 519. More specifically, MCL 324.63702(1) merely inquires into the nature of the permit already held by the operator, and MCL 324.63704(2) enumerates certain documents that an applicant must submit. *Id*., 471 Mich at 514-515. Thus, an eligibility assessment is strictly procedural and has nothing at all to do with the environment. The DEQ must *subsequently* make a determination of the applicant's environmental impact, which does implicate MEPA, under MCL 324.63709. *Id*. at 515-516. As noted, the trial court specifically determined that TechniSands's conduct would not harm the environment within the meaning of MEPA; consequently, there could be no implication of MCL 324.63709. *Id*. at 521. The Court of Appeals did not address the issue of actual environmental harm, and neither did our Supreme Court. *Id*.

Consequently, *in context*, the DEQ's permit eligibility determination did not have an effect on the environment. Our Supreme Court's statement that an "improper administrative decision, standing alone, does not harm the environment" *in that context* clearly means only what it literally says: a technicality is not an environmental harm. This becomes especially apparent in the Court's subsequent explanation that "any undotted 'i' or uncrossed 't' " should not be grounds for invalidating permits under MEPA. *Preserve the Dunes II*, 471 Mich at 522. In contrast, the Court implied that the issuance of TechniSands's permit might contravene MCL 324.63709 if it were determined that TechniSands's mining would harm the environment. *Id*. at 521, 524. Again, the *eligibility* determination was merely the first procedural step in the

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Environmental Quality, 489 Mich 884; 769 NW2d 240 (2011). In light of my dissenting posture, I also need not consider the significance of the Court of Appeals decision in that matter.

permitting process; the DEQ was required to conduct an environmental impact analysis as the next step in the process. *Id*. at 515-516. A technical error in the eligibility analysis could not proximately cause any eventual environmental harm, because that second step would constitute an intervening and superseding cause. See *McMillian v Vilet*, 422 Mich 570, 576-577; 374 NW2d 679 (1985).

I agree with the majority that MEPA requires an analysis of a defendant's conduct. *Preserve the Dunes II*, 471 Mich at 514, 517-519. However, I conclude that our Supreme Court in *Preserve the Dunes II* established nothing more remarkable than a traditional proximate causation analysis. Our Supreme Court did not hold that challenged conduct must be the single immediate and direct cause of the alleged environmental harm. It also did not hold that the issuance of a permit is necessarily too far removed from any environmental harm. Rather, it held that an administrative decision with no relevance to or impact on the environment cannot be challenged under MEPA merely because that decision is part of the cause-in-fact of some alleged environmental harm. I do not find support for the DEQ's contention that *Preserve the Dunes II* insulates all administrative determinations from MEPA challenges *per se*.

However, I caution that I find no "bright line" distinction between procedural and substantive administrative decisions. I take from *Preserve the Dunes II* that any particular challenged decision must be individually considered in its own unique factual and legal context to determine whether it has a proximate causal relationship to the alleged environmental harm. If the decision lacks such a proximate connection, or if there is in fact no environmental harm, then it is not subject to challenge under MEPA, even if the decision is clearly wrong. The trial court should have evaluated each of the DEQ's alleged errors to determine whether they had a proximate causal connection to the alleged environmental harm. I would hold that the trial court erred by concluding that plaintiffs were absolutely barred from bringing the instant claims under MCR 2.116(C)(8). I would reverse and remand for further consideration of the details of plaintiff's arguments.

/s/ Amy Ronayne Krause